

104TH CONGRESS
2D SESSION

H. R. 3782

To modernize the Public Utility Holding Company Act, the Federal Power Act, and the Public Utility Regulatory Policies Act of 1978 to promote competition in the electric power industry.

IN THE HOUSE OF REPRESENTATIVES

JULY 11, 1996

Mr. MARKEY introduced the following bill; which was referred to the
Committee on Commerce

A BILL

To modernize the Public Utility Holding Company Act, the Federal Power Act, and the Public Utility Regulatory Policies Act of 1978 to promote competition in the electric power industry.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Electric Power Com-
5 petition and Consumer Choice Act of 1996”.

6 **SEC. 2. FINDINGS.**

7 The Congress finds that equitable rates for electric
8 consumers and increased efficiency in the use of tech-

1 nology and resources for the generation of electric power
2 require—

3 (1) increased reliance on competition and mar-
4 ket forces rather than traditional rate-of-return reg-
5 ulation of utility monopolies to generate the most ef-
6 ficient, low cost, and reliable electricity for rate-
7 payers;

8 (2) access to transmission and distribution fa-
9 cilities for all suppliers and marketers of electricity
10 with pricing and terms and conditions on a com-
11 parable basis with those who own or control such fa-
12 cilities;

13 (3) a program to promote fuel diversity and
14 conservation and environmental protection through
15 the encouragement of renewable technologies and
16 other environmentally benign generation resources;

17 (4) the ability of electric utilities to seek to re-
18 cover legitimate, verifiable, and nonmitigatable
19 stranded costs for which there is a reasonable expec-
20 tation of recovery;

21 (5) appropriate Federal and State regulation of
22 electric utilities to promote development of a com-
23 petitive electric generation market and protect con-
24 sumers against excessive charges by electric utility
25 companies who exercise continued monopoly control

1 over electric power transmission and distribution;
2 and

3 (6) reform of Federal and State electric utility
4 regulatory laws and regulations, to promote competi-
5 tion and to prevent anticompetitive behavior by enti-
6 ties with market power.

7 **SEC. 3. PUHCA NOT APPLICABLE IN COMPETITIVE MAR-**
8 **KETS.**

9 (a) APPLICATION OF PUHCA.—The Public Utility
10 Holding Company Act of 1935 (15 U.S.C. 79 et seq.) shall
11 not apply to any electric utility company and any holding
12 company of such electric utility company if such electric
13 utility company and each subsidiary, associate, and affili-
14 ate of such electric utility company or of such holding
15 company has received, in accordance with subtitle F of
16 title I of the Public Utility Regulatory Policies Act of
17 1978, a Certification of Competition from each State regu-
18 latory authority which has ratemaking authority over such
19 company, subsidiary, associate, or affiliate, as the case
20 may be. The terms used in this subsection have the same
21 meaning as when used in the Public Utility Holding Com-
22 pany Act of 1935.

23 (b) CERTIFICATION OF COMPETITION.—Title I of the
24 Public Utility Regulatory Policies Act of 1978 is amended
25 by adding the following new subtitle at the end thereof:

1 **“Subtitle F—Standards of**
2 **Competition for Electric Utilities**

3 **“SEC. 151. CERTIFICATION OF COMPETITION BY STATE**
4 **REGULATORY AUTHORITIES.**

5 “(a) VOLUNTARY STATE CERTIFICATION.—A State
6 regulatory authority may elect to issue a State certifi-
7 cation of compliance with standards and requirements of
8 competition under this subtitle to a State regulated elec-
9 tric utility for which it has ratemaking authority. Such
10 election shall be voluntary. Nothing in this subtitle pro-
11 hibits any State regulatory authority from determining
12 that it is not appropriate to issue or deny any such certifi-
13 cation in the case of any electric utility for which the State
14 regulatory authority has ratemaking authority. Nothing in
15 this subtitle prohibits or limits any State regulatory au-
16 thority from implementing any other process regarding
17 competition for electric utilities subject to the jurisdiction
18 of such State regulatory authority.

19 “(b) CRITERIA FOR CERTIFICATION.—After notice
20 and opportunity for hearing, the Commission shall estab-
21 lish, by rule, in accordance with standards of competition
22 set forth in section 152 criteria for the certification by
23 a State regulatory authority that a State regulated electric
24 utility for which it has ratemaking authority has met—

1 “(1) the minimum certification requirements of
2 section 153,

3 “(2) either—

4 “(A) the Federal retail competition stand-
5 ard set forth in section 152(a), or

6 “(B) the Federal divestiture standard set
7 forth in section 152(b); and

8 “(3) such other requirements as the Commis-
9 sion shall prescribe consistent with the public inter-
10 est and the purposes of this subtitle.

11 **“SEC. 152. FEDERAL STANDARDS OF COMPETITION.**

12 “(a) RETAIL COMPETITION STANDARD.—(1) A State
13 regulated electric utility meets the retail competition
14 standard if the State regulatory authority which has rate-
15 making authority over such utility determines, in accord-
16 ance with criteria established by the Commission under
17 section 151(b), and after notice and opportunity for hear-
18 ing, that—

19 “(A) the utility permits competition in retail
20 sales of electric energy to all consumers within its
21 service territory;

22 “(B) the opportunity to build, own, and operate
23 all new generating capacity is open to competition by
24 all sources, and

1 “(C) the electric utility does not gain any ad-
2 vantage over other competitors by virtue of its status
3 as a regulated buyer and seller of electricity in its
4 service territory.

5 “(2) Certification under paragraph (1) of this sub-
6 section shall be withdrawn if the State regulatory author-
7 ity finds that—

8 “(A) an electric utility affiliate is competing un-
9 fairly by using assets, goods, or services obtained
10 from the electric utility at a price below the market
11 value; or

12 “(B) the electric utility or its affiliate has dis-
13 criminatory access to any asset, service, or informa-
14 tion which would be helpful to a competitor where
15 the access is attributable to the electric utility’s sta-
16 tus as a regulated integrated monopoly or the asset
17 or information is an essential facility that is not eco-
18 nomically duplicable by a competitor.

19 “(b) DIVESTITURE STANDARD.—A State regulated
20 electric utility that is an integrated electric utility that
21 owns or controls a monopoly distribution franchise, mo-
22 nopoly transmission facilities, or both, meets the divesti-
23 ture standard of competition if the State regulatory au-
24 thority which has ratemaking authority over such utility
25 determines, in accordance with criteria established by the

1 Commission under section 151(b), and after notice and
2 opportunity for hearing, that the utility has—

3 “(1) divested itself of all existing generation fa-
4 cilities and is prohibited under State law from di-
5 rectly or indirectly acquiring ownership or control of
6 any generation facilities for so long as it owns or
7 controls a monopoly distribution franchise or trans-
8 mission facilities, and

9 “(2) in the case of a utility that owns or con-
10 trols transmission facilities, adopted open access
11 transmission tariffs that have been approved as just,
12 reasonable, and not unduly preferential.

13 **“SEC. 153. MINIMUM CERTIFICATION REQUIREMENTS.**

14 “A State regulatory authority may not issue a certifi-
15 cation of competition under this subtitle to any electric
16 utility unless the authority has made each of the following
17 determinations:

18 “(1) A determination that all suppliers of en-
19 ergy services to the utility or to electricity consumers
20 in the service territory of the utility have both the
21 incentive and opportunity to provide energy-effi-
22 ciency and renewable energy resources that are less
23 costly on a life-cycle basis than displaced generation.

24 “(2) A determination that nonbypassable
25 charges on use of, or access to, the local distribution

1 services or facilities of the utility are in effect and
2 adequate to ensure sustained and equitable alloca-
3 tion of costs associated with low-income services and
4 other investments, including those in fuel diversity
5 and energy efficiency, that deliver system wide bene-
6 fits in the form of equity among, or reduced life-
7 cycle costs of service to, electricity consumers in the
8 service territory of the utility: *Provided*, That the
9 fuel diversity objective may also be met by minimum
10 portfolio standards that ensure maintenance or im-
11 provement of current levels of reliance on renewable
12 energy resources.

13 “(3) A determination that any systems of retail
14 competition among electric-service suppliers are
15 structured to protect customers from price discrimi-
16 nation or undue price increases and to ensure that
17 no customer class can avoid its equitable share of
18 the electric utility’s legitimate, verifiable,
19 nonmitigatable stranded costs for which there is a
20 reasonable expectation of recovery.

21 “(4) A determination that under applicable
22 State laws and regulations, any recovery of stranded
23 costs associated with existing generation assets, is
24 not contingent on continued operation of the genera-
25 tion assets for which recovery is approved.”.

1 (c) CONSIDERATION AND DETERMINATION REGARD-
2 ING RETAIL COMPETITION STANDARDS.—(1) Section 111
3 (d) of such Act is amended by adding the following new
4 paragraph at the end thereof:

5 “(11) RETAIL COMPETITION STANDARDS.—

6 Each electric utility shall meet

7 “(A) the minimum certification require-
8 ments of section 153,

9 “(B) either—

10 “(i) the Federal retail competition
11 standard set forth in section 152(a), or

12 “(ii) the Federal divestiture standard
13 set forth in section 152(b); and

14 “(C) such other requirements as the
15 Commission shall prescribe consistent with
16 the public interest and the purposes of
17 subtitle F.”.

18 (2) Section 112(b) of such Act is amended by insert-
19 ing after “of section 111(d)” in paragraphs (1) and (2)
20 the following “or after the enactment of the Electric
21 Power Competition and Consumer Choice Act of 1996 in
22 the case of the standards under paragraph (11) of section
23 111(d)”.

24 (3) Section 112(c) of such Act is amended by insert-
25 ing “(or after the enactment of the Electric Power Com-

1 petition and Consumer Choice Act of 1996 in the case of
2 the standards under paragraph (11) of section 111(d))”
3 after “enactment of this Act”.

4 (4) Section 124 of such Act is amended as follows:

5 (A) In the first and second sentences after
6 “For purposes of” insert “any provision of”.

7 (B) In the first and second sentences, strike out
8 “enactment of this Act” and insert “enactment of
9 such provision”.

10 (d) TRANSITIONAL PROVISIONS.—(1) Upon passage
11 of this Act, no provision of law shall be construed to pre-
12 empt otherwise applicable State authority to review the
13 prudence of any wholesale or retail cost incurred by a util-
14 ity.

15 (2) Upon passage of this Act, no Federal statute shall
16 be construed to preempt the authority of the Commission
17 to examine existing affiliate contracts or transactions.

18 (3) Nothing in this Act shall be construed to preempt,
19 void, or nullify any existing settlement in part or whole
20 between any currently registered or exempt utility holding
21 company and any State authority or third party.

22 (e) EXISTING AGREEMENTS.—This Act shall have no
23 effect on any agreement in existence on the date of enact-
24 ment of this Act where such agreement is in settlement

1 of a proceeding arising under the Public Utility Holding
2 Company Act.

3 **SEC. 4. MERGERS AND ACQUISITIONS.**

4 Section 203 of the Federal Power Act is amended by
5 inserting “and any applicable requirements of subsection
6 (c)” before “, it shall approve the same” and by adding
7 the following at the end thereof:

8 “(c) MERGERS AND ACQUISITIONS.—No person shall
9 acquire an interest in a public utility that results in effec-
10 tive control or ownership of such utility unless there is
11 an arms-length relationship between all parties to such ac-
12 quisition and—

13 “(1) the Commission first makes the findings
14 set forth in subsection (d); and

15 “(2) such person has transmitted to the Com-
16 mission the certifications set forth in subsection (e).

17 “(d) REQUIRED COMMISSION FINDINGS.—The acqui-
18 sition described in subsection (c)—

19 “(1) shall not create or maintain a situation in-
20 consistent with effective competition in any market
21 in which competition would benefit consumers; and

22 “(2) shall result in substantial cost reductions
23 in the provision of electric service, which cost reduc-
24 tions cannot be achieved at lower cost without the
25 acquisition.

1 “(e) PUBLIC UTILITY CERTIFICATION.—Each public
2 utility which is an affiliate of a person referred to in sub-
3 section (c) shall certify to the Commission both of the fol-
4 lowing:

5 “(1) Where the merger involves an acquisition
6 premium, it will not seek to recover such premium,
7 either directly or indirectly (such as by failing to re-
8 duce rates by an amount equal to the full amount
9 by which costs have been reduced as a result of the
10 merger), in rates charged for any service for which
11 there is not effective competition, to the extent such
12 premium exceeds the amount which the Commission
13 has determined is necessary to minimize the cost of
14 providing such service.

15 “(2) Each State commission with jurisdiction
16 over any public utility which is an affiliate of any
17 party to the acquisition has found that it has the au-
18 thority and resources to prevent the acquisition from
19 having an adverse effect on the rates charged to any
20 retail customer of any public utility which is an affil-
21 iate of any party to the acquisition, including but
22 not limited to the authority to order the public util-
23 ity to cease being an affiliate of such party.

24 “(f) CONDITIONS.—The Commission may establish
25 conditions on any transaction described in subsection (c)

1 as appropriate or necessary to ensure the continuing accu-
 2 racy of all findings made under subsection (d) and certifi-
 3 cations made under subsection (e).

4 “(g) REGULATIONS.—The Commission shall promul-
 5 gate regulations concerning the form of certification re-
 6 quired by subsection (e), the criteria for establishing an
 7 arm’s-length relationship, the definition of “effective com-
 8 petition” and any other matter necessary to implement its
 9 duties under this section.

10 “(h) DEFINITIONS.—For purposes of this section:

11 “(1) The term ‘acquire a substantial interest’
 12 means acquire, merge with, or be a recipient of a
 13 merger.

14 “(2) The term ‘substantial interest in a public
 15 utility’ means any interest, whether in voting stock,
 16 nonvoting stock, securities, partnership share, or any
 17 evidence of indebtedness, where the value of the in-
 18 terest equals 10 percent or more of the book value
 19 of the public utility.”.

20 **SEC. 5. MARKET CONCENTRATION AND AFFILIATE RELA-**
 21 **TIONSHIPS.**

22 Section 318 of the Federal Power Act is amended to
 23 read as follows:

1 **“SEC. 318. MARKET CONCENTRATION AND AFFILIATE RELA-**
2 **TIONSHIPS.**

3 “(a) IN GENERAL.—No public utility, or any affiliate
4 thereof, shall use its ownership or control of any resource
5 to create or maintain a situation inconsistent with effec-
6 tive competition in any market in which competition would
7 benefit consumers.

8 “(b) COMMISSION ACTIONS.—Upon a finding that a
9 public utility, or any affiliate thereof, has violated or is
10 capable of violating subsection (a), the Commission shall
11 order such public utility to take that action, authorized
12 by subsection (c), necessary to eliminate such violation.

13 “(c) AUTHORIZED ACTIONS.—The Commission may
14 order a public utility to take any or all of the following
15 actions:

16 “(1) Sell assets to a nonaffiliated company.

17 “(2) Sell assets to an affiliated company, cou-
18 pled with establishment of arm’s-length relations.

19 “(3) Share access to assets on a nondiscrim-
20 inatory basis at rates which are just and reasonable,
21 and not unduly discriminatory or preferential.

22 “(d) IN GENERAL.—The Commission shall establish
23 regulations which ensure that with respect to diversifica-
24 tion by any public utility or affiliate thereof—

25 “(1) the diversification has no adverse impact
26 on electric consumers of any utility;

1 “(2) there is an arm’s-length relationship be-
2 tween—

3 “(A) the transmission service activities,
4 distribution service activities, and retail sales
5 activities of the public utility; and

6 “(B) any other business activities of the
7 public utility or any affiliate thereof,

8 “(3) such diversification is prohibited unless
9 each State commission that has ratemaking author-
10 ity over such utility or any affiliate thereof has cer-
11 tified to the Federal Energy Regulatory Commission
12 that it has the authority and resources to prevent
13 such diversification from having an adverse effect on
14 retail customers of such public utility or any affiliate
15 thereof; and

16 “(4) the Commission and all affected State
17 commissions have such access to books and records
18 of the public utility and all affiliates thereof as is
19 necessary to ensure that the foregoing conditions are
20 met and continue to be met.

21 “(e) VIOLATIONS.—Upon a finding that any of the
22 conditions listed in subsection (e) have been violated, the
23 Commission shall take any action listed in subsection (g)
24 that it finds necessary or appropriate to remedy such vio-
25 lation and prevent future violations.

1 “(f) CONTRACTS WITH AFFILIATES.—No contract
2 between any public utility and an affiliate, having a total
3 value of \$1,000,000 or more, shall be valid unless each
4 State commission having authority over retail sales of elec-
5 tricity by such public utility has found that—

6 “(1) such contract will have no adverse effect
7 on consumers; and

8 “(2) such State commission has the authority
9 and resources to prevent any such adverse effect.

10 “(g) COSTS AND REVENUES.—No Federal law shall
11 be interpreted to prevent a State commission or the Com-
12 mission, when establishing rates for any type of electric
13 service subject to the jurisdiction of such State commis-
14 sion or the Commission, from disallowing any costs unrea-
15 sonably incurred, or imputing any revenues unreasonably
16 foregone, including costs incurred or revenues foregone as
17 a result of an interaffiliate transaction. The previous sen-
18 tence shall not apply to any cost incurred or revenues fore-
19 gone prior to July 11, 1996, whether or not subject to
20 refund or adjustment.

21 “(h) REGULATIONS.—The Commission shall promul-
22 gate regulations concerning the criteria for establishing an
23 arm’s-length relationship, the definition of ‘effective com-
24 petition’ and any other matter necessary to implement its
25 duties under this section.”.

1 **SEC. 6. TRANSMISSION ACCESS.**

2 Section 211 of the Federal Power Act is amended by
3 adding the following at the end thereof:

4 “(f) TRANSMISSION ACCESS.—The Commission shall
5 promulgate rules establish tariffs applicable in the largest
6 feasible regions within which a single schedule of trans-
7 mission rates is available for use by buyers or sellers of
8 generation, where such buyers and sellers are located with-
9 in such region. Such tariffs shall be designed to—

10 “(1) ensure the economical use of existing gen-
11 erating facilities, and the economical location and
12 use of future generating facilities;

13 “(2) ensure the full recovery by owners of
14 transmission facilities of all prudent transmission
15 costs; and

16 “(3) prevent multiple charges for transmission
17 service based on the number of transmission owners
18 rather than the actual transmission cost.”.

19 **SEC. 7. ACCESS TO BOOKS AND RECORDS.**

20 (a) STATE COMMISSIONS.—Section 201(g)(1) of the
21 Federal Power Act is amended by adding the following at
22 the end thereof: “A public utility, and each affiliate or as-
23 sociate thereof, shall produce for examination such person-
24 nel, books, accounts, memoranda, contracts, records, and
25 any other materials upon an order of any State commis-
26 sion finding that production of such materials will assist

1 the State commission in carrying out its responsibilities.
 2 The cost of any audit ordered by a State commission
 3 under either this section or under State law, shall be borne
 4 by the public utility and its affiliates.”.

5 (b) FERC.—Section 301 is amended by adding the
 6 following at the end thereof:

7 “(d) A public utility, and each affiliate or associate
 8 thereof, shall produce for examination such personnel,
 9 books, accounts, memoranda, contracts, records, and any
 10 other materials upon an order of the Commission finding
 11 that production of such materials will assist the Commis-
 12 sion in carrying out its responsibilities. The cost of any
 13 audit ordered by the Commission under this section, shall
 14 be borne by the public utility and its affiliates.”.

15 **SEC. 8. DEFINITIONS.**

16 Section 3 of the Federal Power Act is amended by
 17 adding the following at the end thereof:

18 “(26) Except as otherwise specifically provided
 19 in this Act, the term ‘affiliate’ means a person that
 20 (directly or indirectly) owns or controls, is owned or
 21 controlled by, or is under common ownership or con-
 22 trol with, another person. For purposes of this para-
 23 graph, the term ‘own’ means to own an equity inter-
 24 est (or the equivalent thereof) of more than 10 per-
 25 cent.

1 “(27) The term ‘arm’s-length relationship’
2 means a relationship between—

3 “(A) those business activities conducted by
4 a public utility for its transmission service cus-
5 tomers, distribution service customers, or retail
6 electric customers; and

7 “(B) any other business activities con-
8 ducted by the same corporation or any affiliate
9 or associate company, where—

10 “(i) such business activities are con-
11 ducted in compliance with Commission
12 rules ensuring that—

13 “(I) no business activity has any
14 advantage over its competitors due to
15 its affiliation with a business which
16 serves transmission service customers,
17 distribution service customers, or re-
18 tail electric customers who do not
19 have the right to choose their own
20 electric supplier; and

21 “(II) no transmission service cus-
22 tomer, distribution service customer
23 or retail electric customer who do not
24 have the right to choose his own elec-
25 tric supplier is made worse off due to

1 its affiliation with a competitive enter-
2 prise; and

3 “(ii) the public utility has certified
4 that with respect to any resource (whether
5 tangible or intangible) owned, or employees
6 employed, by a public utility which is an
7 affiliate or associate of such person, any
8 cost of which has been recovered from the
9 captive customers of such public utility (or,
10 in the case of a registered holding com-
11 pany, from the captive customers of a pub-
12 lic utility which is an affiliate or associate
13 of such public utility), no use of such re-
14 sources or employees shall be made by
15 such public utility or any affiliate or asso-
16 ciate thereof for any purpose other than
17 serving such native load customers, nor
18 shall such resources or employees be sold
19 or transferred to any affiliate or associate
20 therefore, unless such public utility remits
21 to such captive customers, through a pro-
22 cedure found satisfactory by each affected
23 State commission responsible for setting
24 the rates for such customers, the higher of

1 the cost attributable to such use or the
2 market value of such use.

3 “(27) The term ‘diversification’ refers to the
4 conduct of any business activity other than the gen-
5 eration, transmission, distribution or sale of electric
6 energy.

7 “(28) The term ‘economic risk’ includes the
8 risk, in any form, that the cost of a resource borne
9 by the consumer at any time in the life of the re-
10 source will be below the market value of the re-
11 source.

12 “(29) The term ‘effective competition’ refers to
13 a market in which no profit-maximizing seller could
14 impose a significant and nontransitory increase in
15 price. In determining whether an action is inconsis-
16 tent with effective competition, the Commission shall
17 take into account the size of market share and the
18 extent of any barriers to entry. For purposes of this
19 definition, behavior which is mandated by State law
20 is not inconsistent with effective competition.

21 “(30) The term ‘captive customers’ means the
22 group of customers of a public utility who do not
23 have the right to choose their own supplier of elec-
24 tricity.”.

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